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Supreme Court of the United States

OCTOBER TERM, 1950

No. 50

CARL JACOB KUNZ,
Appellant,

against

THE PEOPLE OF THE STATE OF NEW YORK

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

APPELLEE'S BRIEF

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October 18, 1950.

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Statement

This is an appeal from a judgment of the New York Court of Appeals (R. 64-65; 300 N. Y. 273, 90 N. E. 2d 455) affirming a judgment of the Court of Special Sessions of the City of New York, Appellate Part, First Department (R. 41; not officially reported), which affirmed a judgment of the New York City Magistrates' Court, Summons Part, Mid-Manhattan (R. 30).

The defendant's conviction arose out of his addressing a street corner assemblage on the topic of religion without having a permit therefor, as required by the Administrative Code of the City of New York, § 435-7.0, set forth *infra* at pages 3-4.

This appeal was allowed by Mr. Justice JACKSON (R. 68). On May 15, 1950, this Court noted probable jurisdiction (R. 71).

Facts

On September 11, 1948, the defendant spoke to a group of about twenty people from the ground and from a box-platform at Columbus Circle, between 58th and 59th Streets, in the Borough of Manhattan, City of New York, commencing at about 9 P. M. (R. 5-6, 8). He addressed the group, concededly, on a topic of religion (R. 5-7).

Police Officer Francis T. Sullivan saw and heard the defendant speak (R. 5-6). At 10:45 P. M., after noting certain of the defendant's remarks strongly criticizing religions other than that of the defendant, he asked the defendant if he had a Public Worship Permit (R. 5-6). Upon being informed that the defendant had no permit, he served him with a summons (R. 6).

Two other persons who observed and heard the defendant on that occasion were witnesses for the People, to wit, James Vincent, a retired motion picture director, and Bern Messnick, a construction engineer (R. 8-10). They testified (see *infra*, pp. 14-15) that they heard the defendant viciously attack and criticize the Catholic and Jewish religions (R. 9-10, 11-12).

The defendant took the stand and testified that he is a Minister "ordained to the work of the Gospel Ministry * * * by a counsel of pastors" (R. 27; Deft's Exh. A, R. 19, 34-35). He had no schooling in preparation therefor other than grammar school, Bible school and "Just the word" (R. 27). He spoke under the auspices of "Outdoor Gospel Work" of which he is the director (Deft's Exh. A, R. 19, 34), and had been preaching for about six years (R. 27).

He stated that he had a Public Worship Permit in 1946, which was revoked on November 7, 1946 after several hearings before the Fourth Deputy Police Commissioner (R. 19-24). Upon those hearings 18 witnesses testified that the defendant had, in his addresses, denounced and ridiculed religion (R. 21, 24). Accordingly, the Permit was revoked

by letter stating the reason for revocation (R. 21). Defendant made an application for a permit in 1947, which was disapproved (R. 19). A similar application in 1948 was disapproved by letter dated July 13, 1948 (R. 18-19).

The defendant stated that there was "trouble" at his meetings when a police officer was not present (R. 25-27). He admitted "ridiculing and denouncing the Roman Catholic Church" (R. 23), and indicated strong antipathy to the Jewish race and religion (R. 24-25).

A portion of the Manual of Procedure of the Police Department relating to Public Worship Permits was read into the record (R. 21-22).

Motions by the defendant to dismiss at the close of the People's case and of the entire case, upon the usual grounds and also the ground that § 435-7.0 of the Administrative Code violates the Federal and State Constitutions, as amended, were denied by the Magistrate (R. 13-14, 28-30). Magistrate SILVER held that § 435-7.0 was constitutional, and was "especially in a large city like this City of New York" extremely desirable for the safety of speakers as well as the public generally (R. 29). The Magistrate fined the defendant $10 or, in default of payment, sentenced the defendant to 3 days' imprisonment (R. 34). The fine was paid.

STATUTE INVOLVED

The sole issue at the trial and on this appeal concerns the constitutionality of § 435-7.0 of the Administrative Code of the City of New York which was most recently re-enacted by the Legislature of the State of New York at an Extraordinary Session (Laws of New York, 1937, Vol. II, pp. 256-257). Subdivision a of that section provides as follows:

> **"§ 435-7.0 ASSEMBLIES. a. Public Worship.—** It shall be unlawful for any person to be concerned or instrumental in collecting or promoting any assem-

> blage of persons for public worship or exhortation, or to ridicule or denounce any form of religious belief, service or reverence of to preach or expound atheism or agnosticism, or under any pretense therefor, in any street. A clergyman or minister of any denomination, however, or any person responsible to or regularly associated with any church or incorporated missionary society, or any lay-preacher, or lay-reader may conduct religious services, or any authorized representative of a duly incorporated organization devoted to the advancement of the principles of atheism or agnosticism may preach or expound such cause, in any public place or places specified in a permit therefor which may be granted and issued by the police commissioner. This section shall not be construed to prevent any congregation of the Baptist denomination from assembling in a proper place for the purpose of performing the rites of baptism, according to the ceremonies of that church."

Subdivision b of that section makes it unlawful for any person to molest or interfere with the holder of such a permit and subdivision c provides for a penalty (for violating subdivision a or b) of "twenty-five dollars, or imprisonment for thirty days, or both."

The entire section is derived from and virtually identical with §§ 20 and 21 of Chapter 23, Article 3 of the 1915 New York Code of Ordinances (as amended November 22, 1932). Subdivision a of § 435-7.0 of the Administrative Code is almost the same as § 20 of the Code of Ordinances and subdivision b is almost identical with § 21 of the Code. The main difference is that the new section says "It shall be unlawful for * * *" and the old Code provided that "No person shall * * *". Apart from a further slight difference in grammar the old and new statute are the same.

The defendant's constitutional attack actually relates solely to subdivision a of the new § 435-7.0. For convenience the three sentences which compose subdivision a are herewith outlined as follows:

Sentence 1. *Types of meetings prohibited to "any person" except as provided in sentences 2 and 3*

a. public worship or exhortation, or

b. ridicule or denunciation of any form of religious belief, service or exhortation, or

c. preaching of atheism or agnosticism

Sentence 2. *Types of meetings permissible to a very broad class of persons "in any public place or places specified in a permit therefor which may be granted and issued by the police commissioner"*

a. public worship or exhortation (same as 1a), or

b. preaching of atheism or agnosticism (same as 1c)

Sentence 3. *Statute inapplicable—no permit necessary*

a. Baptismal rites of Baptist church.

It is important to note that of the three types of meetings prohibited in Sentence 1, *supra*, two of them (a and c) are allowed by the second sentence if a permit is obtained. The third (b) is prohibited and a permit cannot be obtained therefor.

POLICE REGULATION INVOLVED

The following regulation (see R. 21-22) of the New York City Police Department was read into the above statute by the Court of Appeals in construing the statute:

"**Public Worship Permits:** 1. Public worship permits are issued in compliance with chapter 23, article 3, paragraph 20 of the Code of Ordinances.

2. Application will be filed by the applicant at the Division of Licenses [of the Police Department] with two photographs, one and a half inches square, and (not machine type) of recent date. Permits expire on December 31st of the year of issuance. No fee is charged for this permit.

3. The holder of a public worship permit will be required to notify the precinct commander concerned of the time and location of any street meeting he or she intends to hold. The commanding officer of such precinct will approve of the location, provided he does not interfere with traffic or other local conditions.

4. All meetings must be conducted in an orderly manner and only under the auspices of the organization or person mentioned in the permit. No collections will be taken or contributions accepted, nor will any literature or merchandise be sold in connection with a meeting."

Opinions Below

(1)

The Appellate Part of Special Sessions unanimously affirmed the conviction without opinion (see R. 41; not officially reported).

(2)

The New York Court of Appeals affirmed with an opinion for the majority by Judge DESMOND, reported in 300 N. Y. 273 (1949), 90 N. E. 2d 455. Judge DESMOND held that § 435-7.0 of the New York City Administrative Code is "no more than a necessary and reasonable regulation of the use, for public meetings, of the crowded streets of the world's greatest city" (R. 47), and is constitutional. The ordinance was construed—by reading the administrative regulations into the ordinance—as requiring the issuance of an annual permit for street preaching to a "person" defined in the statute, and as allowing police control of meetings only to the extent of requiring advance notice to a police captain who must approve of the location, unless traffic conditions there make it inexpedient to use that site for such purposes (R. 47).

Judge DESMOND further stated that the power of revocation of the permit, for cause, is fairly implied; that herein the permit was revoked for good reasons and the police commissioner was not bound to issue additional permits to the defendant for the purpose of "starting religious wars on New York's teeming streets" (R. 48-49).

Judge CONWAY dissented in an opinion reported in 300 N. Y. at page 279. Judge CONWAY held that the statute is valid on its face; and concurred with the majority that the permit procedure is a permissible exercise of the police powers, and that "the ordinance grants no right of censorship or previous restraint to the commissioner and does not unconstitutionally infringe upon the freedoms of speech,

religion and assembly" (R. 56). Judge Conway, however, held that the revocation of the defendant's permit and the refusal to issue new permits to him amounted to administrative censorship and unconstitutional application of the statute (R. 60-61).

Judge Bromley dissented in an opinion in which Judge Fuld concurred, reported in 300 N. Y. at page 291. Judge Bromley held the statute invalid upon its face under the Fourteenth Amendment and Article I, §§ 3 and 8 of the State Constitution (R. 63-64).

Summary of Argument

Section 435-7.0 of the Administrative Code of the City of New York—as administratively applied by the City Police Commissioner—is not invalid, as urged by defendant, because of infringement of the freedoms guaranteed by the United States Constitution.

The statute as construed (see Court of Appeals opinion, per Desmond, J., R. 47) requires that a preacher, like the defendant, secure an annual permit from the Police Commissioner and notify a local Police Captain of the time and place of his proposed assemblage on the public streets of persons for public worship. The permit ("Public Worship Permit") is issued if the applicant is a "person" specified in § 435-7.0, subd. a. The holder of the permit must thereafter notify the local Police Captain whose Precinct covers the location of the proposed assemblage, and the Police Captain is required by Department Regulations to approve the time and location unless it will unreasonably interfere with traffic.

Thus, the statute is a reasonable and necessary regulation of the use for public meetings of the crowded streets of a "big city". See *Cantwell* v. *Connecticut*, 310 U. S. 296, 304 (1940); *Cox* v. *New Hampshire*, 312 U. S. 569, 574 (1941).

Defendant was issued a Public Worship Permit in 1946. The Commissioner revoked the defendant's permit in November, 1946, after a full hearing and proof of use by the defendant of the Permit for the sole purpose of vicious and malicious attacks upon religions other than his.

The Commissioner's power of revocation is fairly implied by the statute. Moreover, the Commissioner was not bound to issue further permits to the defendant for the purpose—in effect admitted upon the trial herein by the defendant—of spewing out insults and epithets which invite "trouble" when policemen are not present "to curb the wrath of those whose deepest feelings he wantonly wounds" (see Court of Appeals majority opinion, R. 48). See *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 572 (1942).

ARGUMENT

A statute requiring application by clergymen for a permit to collect and address an assemblage on public worship on public streets does not constitute an invalid infringement of freedoms guaranteed by the Constitution. As applied by the New York City Police Commissioner, it validly promotes the safety, comfort and convenience of the users of the teeming city streets.

The New York Court of Appeals held, DESMOND, J. writing for the majority (R. 47):

> "* * *, we construe the ordinance as requiring the [police] commissioner to give an annual permit for street preaching, to anyone who, like defendant, is a minister of religion, and as allowing police control of meetings only to the extent of requiring advance notice to a police captain who must approve of the location, unless traffic conditions there make it inexpedient to use that site for such purposes. Thus read, the law is no more than a necessary and reasonable regulation of the use, for public meetings, of

> the crowded streets of the world's greatest city, 'general and non-discriminatory legislation [regulating] the times, the places, and the manner' of holding street meetings (*Cantwell* v. *Connecticut*, 310 U. S. 296, 304; see *Cox* v. *New Hampshire*, 312 U. S. 569). The possible unconstitutionality of this permit procedure, as curtailing the rights of those who are not clergymen, like defendant, is not for defendant to argue or for us to consider in this case (*O'Kane* v. *State of New York*, 283 N. Y. 439, 449)."

1. The statute involved herein—as applied to the defendant.

(a)

Section 435-7.0, subd. a of the Administrative Code is merely prohibitory—as was the ordinance in the case of *Kovacs* v. *Cooper*, 336 U. S. 77 (1949), discussed *infra* at pages 18-19. Sentence 1 prohibits generally meetings (1) for public worship or exhortation, or (2) for ridicule or denunciation of any form of religious belief, service, or (3) for preaching of atheism or agnosticism (see *supra*, pp. 3-5).

The prohibition is qualified by sentence 2 which specifies "persons" who may conduct such meetings in any public place or places specified in a permit therefor which may be granted and issued by the police commissioner. The "persons" who may conduct such meetings are:

> "A clergyman or minister of any denomination, or any person responsible to or regularly associated with any church or incorporated missionary society, or any lay-preacher, or lay-reader * * *, or any authorized representative of a duly incorporated organization devoted to the advancement of the principles of atheism or agnosticism".

Sentence 3 of subdivision a authorizes baptismal rites of the Baptist Church, without permit.

Section 435-7.0, subd. a further provides that the specified "persons" may conduct religious services or preach atheism or agnosticism "in any public place or places specified in a permit therefor which may be granted and issued by the police commissioner". This language cannot be said to vest uncontrolled discretion in the Police Commissioner.

In enacting § 435-7.0, subd. a the Legislature specified "persons" who shall be allowed to preach religious doctrines at places for which they have secured a permit therefor from the Police Commissioner in a sufficiently broad manner. The statute is in essence a non-discriminatory provision which has for its objective the safety, comfort and convenience of the people of the city and is a reasonable measure of local control which affects civil liberties only in an allowable minor degree (discussed *infra*, pp. 16-20).

The Police Commissioner administers his function under § 435-7.0, subd. a as a practical matter, first, by issuing Public Worship Permits to persons who qualify under the statute, and no fee is charged therefor (R. 21). The application for a Public Worship Permit (see Deft.'s Exh. A., R. 19, 34-35) incorporates the very language of § 435-7.0, sub. a and requires the applicant to answer questions as to whether he is a clergyman, etc., to name 3 references, to state intention as to solicitation of funds at meetings (prohibited by § 603-11.0 of the New York City Administrative Code) and to state whether a permit has ever been revoked or an application disapproved. In addition, two photographs must be submitted with the application. The information entered by an applicant on the application enables the Police Commissioner to determine whether the applicant falls in the class of "persons" specified in the statute.

Defendant's Exhibit B (R. 36) is a sample copy of a Public Worship Permit which states on the face thereof, in language similar to that found in the Police Manual of Procedure (see *supra*, p. 6, and Deft's Exh. B, R. 19, 36):

"REGULATIONS GOVERNING
THE USE OF THIS PERMIT

1. The holder of this Permit will be required to notify the Commanding Officer of the Precinct of the time and location of any Street Meeting he or she intends to hold. *The Commanding Officer will approve of the location providing it does not interfere with Traffic or other local conditions.* (Italics ours.)

2. All meetings must be conducted in an orderly manner and only under the auspices of Organization mentioned above. Person conducting meeting must prevent any collections or contributions, or the sale of any literature or merchandise.

3. This Permit is issued in accordance with Chapter 18, Section 435-7.0a of the Administrative Code of the City of New York and is revocable at any time."

Paragraph 1 above clearly provides that once a Public Worship Permit has been issued, the Commanding Officer of a precinct is required by the Police Commissioner to approve a specific time and place of assembly, unless it would interfere with traffic or safety or convenience.

The New York Court of Appeals read the regulations into the ordinance, as follows (R. 47):

> "Reading those regulations into the ordinance, as we can and should (see *People* v. *Nahman*, 298 N. Y. 95, and *People* v. *Hass*, 299 N. Y. 190, appeal dismissed 338 U. S. 803, rehearing denied 338 U. S. 881), we construe the ordinance as requiring the commissioner to give an annual permit for street preaching, to anyone who, like defendant, is a minister of religion, and as allowing police control of meetings only to the extent of requiring advance notice to a police captain who must approve of the location, unless traffic conditions there make it inexpedient to use that site for such purposes."

The defendant's testimony reveals how § 435-7.0, subd. a was administered with respect to him. The Police Commissioner in 1946 issued a Public Worship Permit (similar to Deft's Exh. B, R. 19, 36-37) to the defendant, presumably after application by him therefor.

In the latter part of 1946, after numerous complaints to the Police Commissioner concerning the defendant's meetings, hearings were held in October and November of 1946 before the Fourth Deputy Police Commissioner, the Police Commissioner's Assistant in charge of the issuance of Public Worship Permits. Upon those hearings, 18 witnesses testified that the defendant had, in his addresses, denounced and ridiculed religion. Accordingly, the Permit was revoked on November 7, 1946, by letter stating in part: "The complaints, in my opinion, have been fully substantiated. My determination in the matter is that you have, contrary to the provisions of law under which the permit was issued ridiculed and denounced religion, and I am, therefore, in the exercise of discretion, as provided by law, revoking your permit effective forthwith" (R. 21). Subsequently, in 1947 and again in 1948, applications by the defendant for a Public Worship Permit were disapproved by the Police Commissioner.

(b)

The exercise of discretion by the Police Commissioner was not "uncontrolled" and was not "a previous restraint" as was the action of the Chief of Police in the *Saia* case, discussed *infra*, pages 18-19, 24-25. The application in 1946 by the defendant for a Permit indicated to the Police Commissioner that the defendant was a "person" designated in § 435-7.0, subd. a who may preach religious doctrines, and a Permit for that year was issued to him. The Permit directed the defendant to advise Precinct Commanding Officers of the time and place of meetings, and directed those officers to approve the time and place if not constituting an interference with traffic or other local conditions.

After numerous complaints, and hearings thereupon which established ridicule and denunciation of religion by the defendant at his meetings, the Permit was revoked by the Police Commissioner. The revocation was however not "a previous restraint". The defendant had used his permit for almost a year prior to the revocation, and had used it for the illegal purpose of ridiculing and denouncing religion. The New York Court of Appeals discussed the revocation, as follows (R. 48):

> "While the ordinance does not specifically mention revocation of licenses, for cause, we think such power is fairly implied and, in any case, the alleged illegality of a revocation is reviewable by appropriate civil proceedings in the nature of certiorari (Civ. Prac. Act, art. 78). Since the licensing law was valid, one who preached without a license was guilty of a violation, and any impropriety of the revocation of a former license was no defense. We think, too, that once the 1946 permit was revoked for good reasons, the commissioner was not bound to issue further permits."

The defendant, upon the trial herein, admitted "ridiculing and denouncing the Catholic religion," and indicated antipathy to the Jewish race and religion (R. 23-25).

Mr. Vincent, a witness for the People, testified that he heard the defendant say, in the course of his address on September 11, 1948—and the defendant did not deny this in his testimony but rather sought to justify his remarks—(R. 9, 10)

> "The Catholic Church makes merchandise out of souls."
>
> * * * * *
>
> "The Pope is the anti-Christ."
> "The Catholic Church is a religion of the devil."
> "They can save for a price."

Mr. Messnick testified for the People that he heard the defendant call Jews "Christ-killers" (R. 17) and attack

the Jewish people and their faith in the following statement (R. 11):

> "All the garbage that didn't believe in Christ should have been burnt in the incinerators. It's a shame they all weren't."

The record is barren of any evidence of statements by the defendant in the course of his address in which he expounded his religious faith. He was engaged in viciously attacking other religions by use of "offensive" and "derisive, fighting words" of such a nature as to carry his address "outside the scope of his constitutional guarantees" (see *infra*, pp. 17-18, 25). Furthermore, the defendant admitted this to be the usual nature of his addresses when he testified:

> "Q. Do you ever have any trouble at your meetings? A. When an officer is there, no trouble at all.
>
> Q. I asked a question.
>
> The Court: He is answering. When an officer is there, there is no trouble.
>
> *By the Court:*
>
> Q. When an officer is not there, do you have trouble? A. I have trouble then." (R. 25-26).
>
> * * * * *
>
> "*By the Court:*
>
> Q. Did you appear as a complaining witness against a woman listener at one of your meetings? A. That's right. I'll tell you how it come about.
>
> The Court: No, no; that's not necessary." (R. 26-27).

The defendant used, and admittedly would continue to use if granted, a permit "to spew out insults and epithets; public order and decency required that he be stopped (*Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 572), and after due hearing and full proof, he was stopped" (see Court of Appeals majority opinion, R. 49).

The statute herein prohibits, and no Permit may be obtained, if a speaker intends to and does "ridicule or denounce any form of religious belief, service or reverence." The defendant was guilty of such conduct and in effect admitted that fact. The Police Commissioner has no legal authority or discretion, under those circumstances, to grant a permit. His discretion is with respect to cases not involving "ridicule or denunciation" and the statute clearly has not been unconstitutionally applied to the defendant.

Judge DESMOND—in the majority opinion of the Court below—has most aptly summarized the substance of the defendant's aim (see Applt's brief, pp. 8-9), upon this appeal (R. 48-49):

> "Actually, what defendant here insists on as his constitutional right is not only a permit irrevocable for any cause, but the regular attendance at his meetings of a cordon of policemen to curb the wrath of those whose deepest feelings he wantonly wounds. He claims a constitutional right to incite riots, and a constitutional right to the services of policemen to quell those riots. It seems to us that if a community can bar from its streets all raucously noisy advertising devices (*Kovacs* v. *Cooper*, 336 U. S. 77) it may stop defendant from starting religious wars on New York's teeming thoroughfares."

2. Statutes similar to § 435-7.0 have been found valid by this Court.

In recent cases, this Court has upheld statutes similar to the one involved herein.

In *Cox* v. *New Hampshire*, 312 U. S. 569 (1941) this Court passed upon and unanimously upheld the constitutionality of a state statute prohibiting a parade or procession upon a public street without a special license. The Court distinguished *Lovell* v. *Griffin*, *Hague* v. *C.I.O.* and *Cantwell* v. *Connecticut* along the lines referred to *infra*,

pages 21-23 (see 312 U. S. at pp. 577-578). Chief Justice HUGHES stated (p. 574):

> "The authority of a municipality to impose regulations in order to assure the safety and convenience of the people in the use of public highways has never been regarded as inconsistent with civil liberties but rather as one of the means of safeguarding the good order upon which they ultimately depend. The control of travel on the streets of cities is the most familiar illustration of this recognition of social need."

It later concluded (p. 576):

> "We find it impossible to say that the limited authority conferred by the licensing provisions of the statute in question as thus construed by the state contravened any right."

In *Prince* v. *Massachusetts*, 321 U. S. 158 (1944), this Court upheld the constitutionality of a Massachusetts statute making unlawful (1) the sale by any minor of newspapers, magazines, etc., and (2) the furnishing of such literature by any person, parent or guardian to any minor for ultimate sale. The Court affirmed the conviction of a member of the Jehovah's Witnesses who gave religious literature to her ward to distribute and sell on the streets. Mr. Justice RUTLEDGE stated (pp. 170-171):

> "However Jehovah's Witnesses may conceive them, the public highways have not become their religious property merely by their assertion. And there is no denial of equal protection in excluding their children from doing there what no other children may do."

Chaplinsky v. *New Hampshire*, 315 U. S. 568 (1942) is very much in point with respect to that portion of § 435-7.0 of the Administrative Code which absolutely prohibits any person from collecting an assemblage "to ridicule or denounce any form of religious belief, service or reverence." There, this Court passed on the validity of an

ordinance absolutely forbidding any person from addressing "any offensive, derisive or annoying word to any other person who is lawfully in any street or other public place." The Court held that the statute, as construed by the State Court, was constitutional. The State Court had defined the words of the statute as follows (see 315 U. S. at p. 573):

> "'The word 'offensive' is not to be defined in terms of what a particular addressee thinks. * * * The test is what men of common intelligence would understand would be words likely to cause an average addressee to fight.'"

This Court stated (p. 571):

> "And we cannot conceive that cursing a public officer is the exercise of religion in any sense of the word."

See also quoted portion of opinion in *Terminiello* v. *City of Chicago, infra,* page 25.

Similarly, we cannot conceive that cursing another religious belief, etc. is the exercise of religion in any sense of the word.

The prohibition which is under attack herein, while differing in language, can be construed by this Court in the same manner, and, we submit, should be so construed. Anyone who ridicules or denounces a religion might cause "an average addressee to fight." Thus, a reasonable interpretation of that phase of the section referred to herein renders the statute valid on the authority of the *Chaplinsky* case, *supra.*

The limited scope of the decision in *Saia* v. *New York,* 334 U. S. 558 (1948) (see *infra,* pp. 24-25) is conclusively evidenced by *Kovacs* v. *Cooper,* 336 U. S. 77 (1949). In the *Kovacs* case, an ordinance of the City of Trenton, New Jersey, prohibited the use of loud speaker sound trucks or any other instrument "of any kind or character which emits therefrom loud and raucous noises." The conviction of the

defendant who used such a truck in a labor dispute was affirmed by an equally divided Court of Errors and Appeals of New Jersey (135 N. J. L. 584). This Court upheld the validity of the ordinance, 8 of the 9 Justices agreeing that the ordinance presented a problem of "regulation" and not of deprivation of the right of free speech. The opinion of Justice REED (joined in by Chief Justice VINSON and Justice BURTON) held that the ordinance constituted a proper exercise of police power, and stated (336 U. S. p. 83):

> "The police power of a state extends beyond health, morals and safety, and comprehends the duty, within constitutional limitations, to protect the well-being and tranquility of a community. A state or city may prohibit acts or things reasonably thought to bring evil or harm to its people."

Four of the Justices deciding the *Kovacs* case—Justice JACKSON (concurring with the majority in a separate opinion) and Justice BLACK (dissenting in an opinion concurred in by Justices DOUGLAS and RUTLEDGE)—stated (336 U. S. at pp. 97, 101-102) that the *Kovacs* decision in effect constitutes a repudiation of the *Saia* decision.

In *People* v. *Hass*, 299 N. Y. 190 (1949), the defendant had been convicted of making a political address in a New York City park without having obtained a permit therefor, in violation of Rule 21 of the Park Department Regulations. The rule provided that no person shall exhibit or distribute any sign, placard, notice or appeal of any kind or description "in any park or upon any park street except by permit". The New York Court of Appeals upheld the validity of the regulation as administered. This Court dismissed the appeal (338 U. S. 803) and denied rehearing (338 U. S. 881). See also *Davis* v. *Massachusetts*, 167 U. S. 43 (1897).

In *American Communications Ass'n, C.I.O.* v. *Douds*, 70 S. Ct. 674 (1950) this Court held the non-Communist affidavit provision of the Labor Management Relations Act of 1947 (61 Stat. 136, 146) to be a valid enactment, intended

"to forestall future dangerous acts" (70 S. Ct. at p. 692). Chief Justice VINSON stated in the majority opinion (p. 691):

> "That amendment [the First Amendment] requires that one be permitted to believe what he will. It requires that one be permitted to advocate what he will unless there is a clear and present danger that a substantial public evil will result therefrom. It does not require that he be permitted to be the keeper of the arsenal."

And further at page 683:

> "When the effect of a statute or ordinance upon the exercise of First Amendment freedoms is relatively small and the public interest to be protected is substantial, it is obvious that a rigid test requiring a showing of imminent danger to the security of the Nation is an absurdity."

Section 435-7.0 of the New York City Administrative Code as construed by the Court of Appeals constitutes a valid regulation of the use of the city streets for the purpose of promoting the safety, comfort and convenience of the many travelers upon the highways. It seems logical, moreover, that a city of eight million inhabitants necessarily requires more stringent regulations of the use of its streets than a smaller community. See *Kovacs* v. *Cooper*, 336 U. S. 77, 82 (1949).

3. The authorities relied upon by defendant are distinguishable.

Jamison v. *Texas*, 318 U. S. 413 (1934), involved an ordinance of the City of Dallas, Texas, which prohibited the dissemination of handbills on the streets of Dallas. This Court held such an absolute prohibition unconstitutional and reversed the conviction of a member of the Jehovah's Witnesses who had disseminated religious handbills.

Hague v. *C. I. O.*, 307 U. S. 496 (1938), arose out of labor activity in Jersey City when the C. I. O. was attempting an organizing campaign. The City ordinance there involved

forbade the leasing of any hall, without a permit from the Chief of Police, for a public meeting at which a speaker shall advocate the overthrow of the government. The ordinance also prohibited the dissemination of printed matter on the streets. The Board of Commissioners of Jersey City had also passed an ordinance regulating by permit the use of every public street or building (p. 502). The C. I. O. sought an injunction against the concerted plan on the part of City authorities under color of the above statutes, which, for all practical purposes, arbitrarily suppressed and prohibited that labor organization from using the streets for any of its lawful purposes, one of which was to acquaint the citizens of Jersey City with the provisions of the National Labor Relations Act. The majority opinion (per ROBERTS, J.) stated that it merely decided the narrow question that the C. I. O. has a privilege under the Federal Constitution to use the streets for lawful purposes and that privilege is secure against state abridgement (307 U. S. at p. 512).

Cantwell v. *Connecticut*, 310 U. S. 296 (1940) (Applt's brief, p. 7), involved the activities of the Jehovah's Witnesses in New Haven. They had been convicted of violating a statute requiring a permit for religious solicitations and also of a breach of the peace. Their conduct was as follows: they went from house to house with phonograph records, and asked permission to play them; if permission was granted, they also asked to sell a pamphlet; they did nothing further. No violence or interference with traffic was, or could be, involved. In holding the ordinance unconstitutional, this Court pointed out that the authority granting a permit was given the sole power to determine whether the particular cause of solicitation was "religious" (p. 305). This Court then stated (p. 305):

> "If he finds that the cause is not that of religion, to solicit for it becomes a crime. He is not to issue a certificate as a matter of course. * * * *Such a censorship* of religion as the means of determining its right to survive is a denial of liberty protected by the

> First Amendment and included in the liberty which is within the protection of the Fourteenth." (Italics ours.)

In the case at bar if the discussion (*cf.* with solicitation) is not religious, then instead of becoming a crime as a matter of course (as the Connecticut law provided), it is permissible as a matter of course. Also, the "persons" who may speak are clearly specified in § 435-7.0 (see *supra*, p. 4) whereas in the Connecticut law the local enforcement officer was delegated the power to determine which "cause" was "religious." Moreover, the New York statute intends to regulate public *assemblies* on the streets whereas the *Cantwell* case did not involve assemblages. In the *Cantwell* case itself, this Court indicated that a statute such as the one involved herein is not objectionable when it stated (p. 304):

> "It is equally clear that a State may by general and non-discriminatory legislation regulate the times, the places, and the manner of soliciting upon its streets, and of holding meetings thereon; and may in other respects safe-guard the peace, good order and comfort of the community, without unconstitutionally invading the liberties protected by the Fourteenth Amendment. The appellants are right in their insistence that the Act in question is not such a regulation. If a certificate is procured, solicitation is permitted without restraint but, in the absence of a certificate, solicitation is altogether prohibited."

Largent v. *Texas*, 318 U. S. 418 (1943), decided at the same time as *Jamison* v. *Texas*, 318 U. S. 413 (1943), discussed *supra*, page 20, also involved the dissemination and distribution of books and pamphlets by Jehovah's witnesses. The Court on the basis of its prior decisions held that statute unconstitutional.

Lovell v. *Griffin*, 303 U. S. 444 (1937) was the predecessor and authority for the above decision. It was there held that an ordinance of the City of Griffin, Georgia which pro-

hibited the distribution of any literature of any kind in that City without a permit from the City Manager was unconstitutional. The ordinance, which referred to the distribution of any circulars, handbooks, advertising or literature of any kind, was invoked to convict Jehovah's Witnesses who disseminated religious literature (p. 450). This Court held such an ordinance invalid on its face (p. 451).

Thomas v. *Collins*, 323 U. S. 516 (1944) (Applt's brief, pp. 7-8, 9), was a case argued twice before this Court and resulted finally in a 5-4 decision. There a Texas statute required labor organizers to register and procure an organizer's card from a designated state official before soliciting membership in labor unions. R. J. Thomas, President of the United Auto Workers in Detroit, arranged to speak on a certain date at a Texas mass meeting to solicit membership in the C.I.O. On the afternoon before the meeting a Texas Court granted an injunction prohibiting the speech unless Thomas first obtained an organizer's card. Thomas was served with the order but made the speech anyhow. The majority of this Court, in holding the statute unconstitutional, qualified its opinion as follows (p. 536):

> "The assembly was entirely peaceable, and had no other than a wholly lawful purpose. *The statements forbidden were not in themselves unlawful, had no tendency to incite to unlawful action, involved no element of clear and present, grave and immediate danger to the public welfare.*" (Italics ours.)

The obvious implication is that where forbidden statements do involve the risks mentioned, a state can reasonably regulate the assembly.

Neither *Near* v. *Minnesota*, 283 U. S. 697 (1931) nor *Winters* v. *New York*, 333 U. S. 507 (1948), involved the use of the spoken would to a gathered assemblage as herein, and they are not applicable. In the *Near* case (Applt's brief, p. 9), this Court (four Justices dissenting) held uncon-

stitutional a statute authorizing a suit to enjoin publication of a "malicious, scandalous and defamatory newspaper, magazine or other periodical", as applied to publications charging neglect of duty and corruption of law-enforcing officers.

This Court in *Winters* v. *New York*, 333 U. S. 507 (Appl't's brief, p. 9), held invalid (three Justices dissenting) a penal statute prohibiting the distribution of magazines made up of news or stories "of deeds of bloodshed, lust or crime". We fail to see any similarity between the statutes involved in the *Winters* case and the instant case.

The defendant also cites (brief, p. 5) *Saia* v. *New York*, 334 U. S. 558 (1948). In that case, an ordinance of the City of Lockport made it unlawful for any person to maintain "in any building or on any premises or on any automobile * * *, any loud speaker or any device of any kind whereby the sound therefrom is cast directly upon the streets and public places * * *." The ordinance added that "Public dissemination, through radio loud speakers, of items of news and matters of public concern and athletic activities" are permissible if a permit is obtained from the Chief of Police. Defendant, a member of the sect of Jehovah's Witnesses, operated a radio loud speaker for religious purposes without a permit. This Court reversed (5-4) the criminal conviction, holding that the ordinance was unconstitutional since the statute exercised a "previous restraint" on free speech and prescribed no controls or standards for the exercise of discretion by the Chief of Police.

The majority opinion in the *Saia* case (334 U. S. at p. 562) held that free speech may be controlled "by narrowly drawn statutes" which do not permit denial of free speech in the uncontrolled discretion of peace officers. The ordinance involved herein is narrowly drawn and does not at all repose uncontrolled discretion in the Police Commissioner (see *supra*, pp. 13-16).

In *Terminiello* v. *City of Chicago*, 337 U. S. 1 (1949), this Court in a 5-4 decision held invalid an ordinance forbidding any "breach of the peace." The Trial Court had instructed the jury that any behavior which "stirs the public to anger, invites dispute, brings about a condition of unrest, or creates a disturbance," violates the ordinance. This Court found that the ordinance *as construed by the Trial Court* infringed upon the petitioner's constitutional guaranties of freedom of speech. The majority opinion stated (DOUGLAS, J.) at page 3:

> "The argument here has been focused on the issue of whether the content of petitioner's speech was composed of derisive, fighting words which carried it outside the scope of the constitutional guarantees. See *Chaplinsky* v. *New Hampshire*, 315 U. S. 568; *Cantwell* v. *Connecticut*, 310 U. S. 296, 310. We do not reach that question, for there is a preliminary question that is dispositive of the case."

Because of the varying ordinances involved, it is difficult to summarize and categorize the decisions upon which the defendant relies herein. However, not one requires—in our opinion—a finding of invalidity of the statute involved herein. The *Jamison, Largent, Lovell, Winters* and *Near* decisions held unconstitutional ordinances relating almost solely to the dissemination of literature on the streets. The *Hague* and *Thomas* cases held unconstitutional ordinances used as instruments of arbitrary suppression by the municipal authorities against a particular class or group of persons. The *Cantwell* case concerned religious solicitation and the case is merely a state decision contrary to decisions reached in other states. The *Saia* case pertained to loud speakers and its scope has been limited in the more recent decision in *Kovacs* v. *Cooper* (see *supra*, pp. 18-19). The *Terminiello* case held unconstitutional an ordinance which as construed by the Trial Court prohibited any behavior inviting "dispute."

CONCLUSION

The judgment should be affirmed

New York, N. Y., October 10, 1950.

Respectfully submitted,

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